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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SHABINA DESAI et al., Plaintiffs and Appellants, v. SELECT PORTFOLIO SERVICING, INC., et al., Defendants and Respondents.	2d Civil No. B287204 (Super. Ct. No. 56-2017-00492896-CU-OR-VTA) (Ventura County)

Shabina and Yogesh Desai have avoided foreclosure for nearly a decade after defaulting on a home loan secured by a deed of trust. They allege that respondent Deutsche Bank National Trust Company (Bank) and its agents lack authority to foreclose because the loan was belatedly securitized and the deed of trust was belatedly assigned. The trial court dismissed the lawsuit on demurrer. We affirm because appellants cannot sue preemptively to challenge the trustee's authority to initiate foreclosure.

FACTS AND PROCEDURAL HISTORY[1]

In 2004, appellants obtained a $400,000 loan (Loan) from New Century Mortgage Corporation to purchase a home in Thousand Oaks. A deed of trust (DOT) secures the Loan. The Loan may be sold without prior notice to appellants.

Shortly after origination, the Loan was sold to a mortgage-backed securities trust (Trust). Bank is trustee of the Trust. Appellants allege that the Loan was not validly transferred before the closing date of the Trust.

In January 2010, a notice of default on the Loan was recorded, listing an overdue debt of $49,927.55. Appellants do not deny their default. In February 2010, New Century Mortgage recorded an assignment of the DOT, naming Bank as the assignee. Appellants allege that New Century Mortgage declared bankruptcy in 2007; once its assets were liquidated, it had no interest to assign to Bank in 2010. Further, the assignment bears the forged signature of a "notorious robo-signer."

Beginning in April 2010, appellants separately filed for bankruptcy to stop a foreclosure on their home. Their bankruptcy schedules list their indebtedness on the Loan, without disputing its validity or listing any claims against Bank as an asset. The notice of default was rescinded because appellants were in bankruptcy.

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[1] The facts are derived from the first amended complaint, the exhibits attached to the pleading, and documents subject to judicial notice. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 (*Yvanova*); *Thaler v. Household Finance Corp.* (2000) 80 Cal.App.4th 1093, 1101.)

After bankruptcy proceedings ended, Bank's loan servicer Select Portfolio Servicing, Inc., executed a substitution of trustee in November 2016, naming respondent The Wolf Firm, a law corporation, as trustee. The Wolf Firm recorded a notice of default listing a $232,317.79 delinquency on the Loan. Appellants allege that the substitution of trustee and notice of default are void because Bank is not the true owner of the Loan and has no beneficial interest in the DOT.

Appellants sued Bank, Select Portfolio Servicing and The Wolf Firm. The amended complaint asserts causes of action for declaratory relief; wrongful foreclosure; quiet title; unjust enrichment; Civil Code violations; slander of title; to cancel instruments; and unfair business practices.

Respondents demurred. The court sustained the demurrers without leave to amend, finding that the lawsuit challenges Bank's "authority to initiate foreclosures, which is the basis for each of [plaintiffs'] causes of action. Plaintiffs do not allege that there has been a sale." The court stated that the nonjudicial foreclosure scheme does not allow preemptive suits to challenge deed of trust assignments. It entered judgment for respondents.

DISCUSSION

Appeal and Review

Appeal lies from the judgment of dismissal. (Code Civ. Proc., §§ 581d, 904.1, subd. (a)(1); *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 667.) We review the pleading de novo to determine if a cause of action has been stated, accepting the truth of properly pleaded material facts. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The contents

of exhibits attached to the complaint take precedence over conflicting facts alleged in the pleading. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 56.)

Appellants Lack Standing

Appellants' brief does not recite the elements of their nine causes of action or list facts supporting each element. Instead, they make a blanket argument that they have standing to preempt a possible future foreclosure because the Loan was not properly securitized and the DOT was not assigned to Bank. Appellants must have standing to proceed. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813-814 (*Saterbak).*)

Appellants' claim "is not a novel one. The wave of real estate loan defaults over the past decade has given rise to a number of creative theories developed by individuals hoping to avoid foreclosure. The argument that a defendant lacks standing to foreclose because of an improper securitization process has recently become particularly popular." (*Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 741.) However, appellants' claim that the Loan was not assigned to the Trust prior to its closing date "do[es] not give rise to a viable preemptive action that overrides California's nonjudicial foreclosure rules." (*Id.* at pp. 743-744; accord, *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1256-1260.)

The streamlined nonjudicial foreclosure procedure does not authorize an inquiry into the trustee's authority. "Once recorded," a substitution of trustee "shall constitute conclusive evidence of the authority of the substituted trustee . . . . " (Civ. Code, § 2934a, subd. (d); *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 16.) "[W]here a deed of trust is involved, the

trustee may initiate foreclosure irrespective of whether an assignment of the beneficial interest is recorded." (*Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 336.)

Where, as here, borrowers admit their debt and their default, they cannot construct judicial impediments to foreclosure. The Supreme Court has explained, "[a] foreclosed upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interests [citation]—the borrower has lost ownership to the home in an allegedly illegal trustee's sale." (*Yvanova, supra,* 62 Cal.4th at p. 937.) However, "[w]e do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed." (*Id.* at p. 924.) "California courts do not allow such preemptive suits because they 'would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature.' [Citations.]" (*Saterbak*, *supra*, 245 Cal.App.4th at p. 814.)

A series of loan assignments does not prevent Bank and its agents from foreclosing. In *Saterbak*, the borrower alleged that her loan was securitized after the closing date for the trust; the assignment to the defendant bank was invalid; and the documents were robo-signed or forged. (*Saterbak*, *supra*, 245 Cal.App.4th at pp. 811-812.) The Court of Appeal affirmed the dismissal of Saterbak's complaint because she had no standing to challenge the assignment of her loan. (*Id.* at pp. 814-815.) *Saterbak* controls appellants' appeal.

Ample case law forbids preforeclosure lawsuits alleging improper loan assignments. (See *Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 160-161 [legislative policy does

not allow efforts to enjoin a foreclosure sale]; *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1493 [a debtor may not bring a preemptive lawsuit seeking to force the foreclosing entity to prove its authority before the sale]; *Kan v. Guild Mortgage Co.*, *supra*, 230 Cal.App.4th at pp. 741-745 [no standing to make a preforeclosure claim of improper securitization or assignment]; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1156 [no standing to bring a preemptive action challenging the defendant's power to foreclose]; *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 280 [nonjudicial foreclosure laws are intended to provide a speedy, efficient and inexpensive remedy against a defaulting borrower].)

Appellants argue that the 2010 assignment of the DOT to Bank is void because it was made after New Century's assets were liquidated. The Supreme Court shed light on deed of trust assignments in *Yvanova*: "[A] borrower can generally raise no objection to assignment of the note and deed of trust. A promissory note is a negotiable instrument the lender may sell without notice to the borrower. [Citation.] The deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment. [Citations.]" (*Yvanova*, *supra*, 62 Cal.4th at p. 927.)

Applying this rule, we conclude that the 2010 assignment of appellants' DOT is redundant. The Loan states that it may be sold "without prior notice" to appellants; it was securitized after origination. Appellants cannot challenge Bank's authority as trustee of the securitized Trust. (*Saterbak*, *supra*, 245 Cal.App.4th at pp. 814-815 [a defect in the assignment of a loan to a securitized trust means it is "voidable" by the parties to the

assignment, not "void"].) The DOT "is inseparable" from the Loan and followed it even without the separate assignment. (*Yvanova*, *supra*, 62 Cal.4th at p. 927.) Appellants "lack standing to challenge the validity of robo-signatures" on the assignment, which are voidable, not void. (*Mendoza v. JPMorgan Chase Bank* (2016) 6 Cal.App.5th 802, 819.)

Leave to Amend

A plaintiff may request amendment on appeal. (Code Civ. Proc., § 472c, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746.) The burden of demonstrating a reasonable possibility that defects can be cured "is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 520, fn. 16.)

Appellants propose to attach the Delaware bankruptcy filings of New Century Mortgage, to show that Bank did not acquire the lender's assets and that the lender could not assign the DOT to Bank in 2010. Inclusion of the lender's bankruptcy papers would not cure a defect or change the legal effect of the pleading. (*Yvanova*, *supra*, 62 Cal.4th at p. 924; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) For the reasons discussed in the preceding section, the Loan could be freely sold after origination and was transferred to the Trust in 2004. The DOT automatically followed the transfer of the Loan, even without the 2010 assignment.

The pleading is an impermissible attempt to preempt a nonjudicial foreclosure sale. The court did not abuse its discretion by sustaining respondents' demurrers without leave to amend.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

Law Offices of Mark W. Lapham and Mark W. Lapham for Plaintiffs and Appellants.

Kutak Rock and Steven M. Dailey for Defendants and Respondents.